No. 89-1060

JAN 31 1990
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In The

Supreme Court of the United States

October Term, 1989

DARRELL LEDSOME,

Petitioner,

v.

U-BRAND CORPORATION, FOUNDRY DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ASHLAND COUNTY, OHIO, FIFTH APPELLATE DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should an employee be relieved of his obligation to allege a breach of his union's duty of fair representation in order to maintain an action against his employer for breach of a collective bargaining agreement where the agreement contains an exclusive grievance procedure which has not been repudiated by the employer?

STATEMENT OF CORPORATE AFFILIATION

At the time of petitioner's employment, U-Brand Corporation was a wholly-owned subsidiary of Worthington Industries, Incorporated. On January 16, 1990, all outstanding shares of U-Brand Corporation were purchased by Mueller Acquisition Corporation, a wholly-owned subsidiary of Mueller Brass Company, a Michigan corporation. The collective bargaining agreement between U-Brand and petitioner's Union remains in effect.

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U-BRAND CORPORATION, FOUNDRY DIVISION,

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, U-Brand Corporation, Foundry Division, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Court of Appeals of Ashland County, Ohio, Fifth Appellate District.

STATEMENT OF THE CASE

Petitioner, Darrell Ledsome ("petitioner"), was employed by U-Brand Corporation, Foundry Division ("U-Brand") from August 25, 1987 through March 9, 1988, at which time he was discharged. The notice of termination stated that petitioner was discharged for possession of alcohol and marijuana on Company property, use of

alcohol and marijuana on Company property, and reporting for work under the influence of alcohol and/or marijuana, each of which violates U-Brand's rules concerning safety, conduct, attitude, and disobedience.

On June 3, 1985, U-Brand and the International Molders and Allied Workers Union of AFL-CIO Local 258 (the "Union") entered into a collective bargaining agreement ("CBA") covering U-Brand's production and maintenance employees, including petitioner. Pursuant to the CBA, employees retain their jobs on condition of good behavior, efficiency, and honesty. The Company has a right to discharge employees for failure to meet those conditions, subject to the grievance procedure.

Article III of the CBA contains a four-step grievance procedure culminating in arbitration "if mutually agreed upon by the Union and the management." The grievance procedure does not expressly state that it is the exclusive means of resolving grievances, nor does it expressly state that it is not the exclusive means of resolving grievances. After discharge, petitioner exhausted his rights to grieve under Article III.

As it was permitted to do under the CBA, U-Brand declined to submit petitioner's grievance to arbitration. Under Article XVI of the CBA, the Union had the authority to call a strike, slowdown, or stoppage of work after the grievance procedure was exhausted. The Union, however, did not do so.

On September 8, 1988, petitioner filed a complaint in the Ashland County (Ohio) Court of Common Pleas against U-Brand. In his complaint, petitioner alleged that

he was employed by U-Brand and that he was discharged in violation of the CBA.

On October 7, 1988, U-Brand served its motion to dismiss, which was granted on January 6, 1989. The trial court concluded that petitioner had failed to state a claim upon which relief could be granted under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because he had alleged neither that U-Brand had repudiated the contractual grievance procedure nor that the Union had breached its statutory duty of fair representation. Petitioner appealed to the Court of Appeals for the Fifth Appellate District of Ohio, which unanimously affirmed the trial court's decision.

Petitioner then filed a Motion to Certify the Record and Memorandum in Support of Jurisdiction with the Supreme Court of Ohio. On October 18, 1989, the Supreme Court of Ohio unanimously denied petitioner's motion. Petitioner now seeks review by this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The prior decisions of this Court do not mandate arbitration as a pre-condition for judicial deferral to the negotiated grievance settlement procedures of a collective bargaining agreement.

Petitioner initially argues that review should be granted in this case because the court below has misread this Court's holdings in decisions regarding alternative means of resolving disputes between unions and employers. However, to the extent that petitioner argues

that federal law mandates that final and binding arbitration be included in a dispute settlement procedure in order for courts to defer to such a procedure, then it is petitioner who has misread this Court's prior decisions.

Federal labor law favors private settlement of disputes by a method agreed upon by the parties. Section 203(d) of the Labor Management Relations Act provides that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method of settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d). The goal of this policy can be met only when "the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960). Courts, therefore, should not dictate what form a grievance procedure should take.

Indeed, unless it is explicitly stated to the contrary in a CBA, the presumption is that a contractual method for the settlement of grievances is exclusive, precluding a possibility of employee lawsuits. As this Court stated in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (quoting *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962)):

> A contrary rule . . . has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule

> creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements."

While "[t]he federal rule [favoring private settlement] would not of course preclude [the employee's] court suit if the parties to the collective bargaining agreement *expressly agreed that arbitration was not the exclusive remedy*," *Maddox*, 379 U.S. at 657-58 (emphasis added), as a general matter, grievance procedures enjoy a presumption of exclusivity and finality.

Given the federal policy favoring non-judicial means of determining contractual grievances, as found in 29 U.S.C. § 173(d) and decisions of this Court such as *Maddox*, any doubt must be resolved against the conclusion that individual employees are free to avoid a contractual grievance procedure in favor of a lawsuit. "Of the three available forums for the resolution of disputes – contractual grievance procedure such has [sic] arbitration, or the court, or the picket line – the Supreme Court has consistently sanctioned the one chosen by the parties in their collective agreement." *Haynes v. United States Pipe & Foundry Co.*, 362 F.2d 414, 416 (5th Cir. 1966).

Moreover, in *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221 (7th Cir. 1985), the Seventh Circuit Court of Appeals recognized that arbitration is not a necessary component of any private settlement procedure for an employee to be bound by that procedure. The court of appeals stated therein:

> [S]tatutory policy, as expressed in § 203(d) of the Labor Management Relations Act, 29 U.S.C. § 173(d), makes no mention of arbitration,

> and . . . , in fact, Congress had refused to prescribe compulsory arbitration as a remedy when enacting § 203(d). . . .Moreover, the Supreme Court had consistently construed the policy in § 203(d) as requiring that the parties be bound by whatever grievance remedies they had negotiated.

Id. at 1225 (citations omitted).

Petitioner contends that any grievance procedure which does not include mandatory final and binding arbitration is not entitled to application of the exclusivity or finality doctrine. Such a conclusion is contrary to law. Under Section 203(d), parties to a CBA are free to choose their own grievance settlement procedures. Arbitration of disputes is not an essential element of settlement procedures for federal courts to defer to such procedures. Here, U-Brand and the Union agreed to a procedure to resolve employee grievances. This procedure includes arbitration "if mutually agreed upon by the Union and the management." There has been no suggestion that the parties intended to permit employees to utilize the grievance procedure and also to file lawsuits. The petitioner has received all that his Union bargained for.

In order for petitioner to avoid the exclusivity and finality of the agreed upon settlement procedures in this case, he must allege that the employer repudiated the contract or that his Union breached its duty of fair representation. *See Vaca v. Sipes*, 386 U.S. 171 (1967). While *Vaca* created a narrow exception to the presumption of exclusivity, the Court there nevertheless affirmed the basic principle that great deference should be accorded grievance procedures in the absence of union misconduct. Here, where petitioner did not allege a breach of his Union's duty of fair representation, the Ohio courts properly dismissed his complaint.

2. The alleged conflict among the courts of appeals and the state courts is not a true or significant conflict and can be reconciled on the factual differences of the cases.

Petitioner argues that the Sixth Circuit Court of Appeals' decisions in *Fortune v. National Twist Drill & Tool Division, Lear Siegler, Inc.*, 684 F.2d 374 (6th Cir. 1982) and *Groves v. Ring Screw Works*, 882 F.2d 1081, *reh'g and reh'g en banc den.*, 882 F.2d 1081 (6th Cir. 1989), conflict with the decisions of other courts of appeals and state courts. Contrary to petitioner's assertions, the decisions cited by him do not directly conflict with the law of the Sixth Circuit as found in *Fortune* and *Groves*.

The courts below in this case relied on the decision of the Sixth Circuit in *Fortune*. In that case, the applicable CBA did not provide for arbitration. Instead, the union had the right to strike after the exhaustion of the grievance procedure. After the two employees involved in the case had exhausted the grievance procedure and their union declined to strike, the two filed suit in federal court under Section 301. The trial court granted the employer's motion for summary judgment on the grounds that the employees had failed to allege a breach of the duty of fair representation by their union.

On appeal, the Sixth Circuit concluded that the result obtained was final and binding on the parties, thereby precluding an employee lawsuit, even though the parties did not agree to have "final and binding" arbitration as part of the grievance procedure. The Sixth Circuit stated:

> Where the parties have failed to agree upon arbitration as a method of breaking a deadlocked dispute over a grievance, we are cited to

> no provision of federal law which gives the federal courts the power to make the decision for the parties.

Fortune, 684 F.2d at 375. Accordingly, in the absence of an allegation of the breach of the duty of fair representation, the Sixth Circuit found no further recourse for the employee. *See aiso, Vaca.*

The Sixth Circuit reaffirmed its holding in *Fortune* in *Groves*, which involved a CBA materially identical to the one in this case. The court in *Groves* stated:

> The CBAs in these cases did provide for specific grievance procedures, finally including arbitration, if mutually acceptable. Absent arbitration, self-help appears to be the means to resolve an unsettled dispute. In this type of situation our circuit has held that an individual is barred from proceeding under § 301 absent an allegation of lack of fair representation by the union.

Groves, 882 F.2d at 1086-87. The Sixth Circuit has, thus, continued to recognize and has not retreated from the principle that the parties to a CBA must be free to develop their own methods of settling differences and that courts should defer to those methods.

Finally, in an unreported Sixth Circuit decision involving the CBA between U-Brand and petitioner's Union arising out of identical facts, the court unanimously affirmed the trial court's dismissal of the plaintiff-employee's breach of contract claim where he had failed to allege a breach of his Union's duty of fair representation. *Frye v. U-Brand Corp.*, Case No. 89-3324 (6th Cir. Dec. 19, 1989). Page 1a of the Appendix.

Petitioner cites a number of cases for the proposition that where a CBA does not contain a grievance procedure culminating in mandatory arbitration, an aggrieved employee may pursue his claim against his employer in the courts without alleging a breach of the duty of fair representation. Petitioner argues that these cases are in conflict with the decisions of the Sixth Circuit and the courts below in the present case. These cases, however, are distinguishable.[1]

Of the cases cited by petitioner, only the Ninth Circuit Court of Appeals' decision in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), appears not to be as readily distinguishable. The court in *Dickeson* concluded that "when the contract is silent as to whether the grievance procedure is final and the only remedy is to strike, we are very hesitant to conclude that the parties intended that the procedure be final." *Id.* at 629. However, as the trial court in the present case noted, "unlike the U-Brand grievance procedure, the grievance procedure at issue in *Dickeson* did not provide for arbitration of grievances under any circumstances." Page 13a of the Appendix to petitioner's brief. Accordingly, while the court in *Dickeson* may have been justified in refusing to

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[1] The cases upon which petitioner relies are set forth in footnote 1 of his petition. However, none of these decisions involved a CBA containing a detailed four-step grievance procedure specifically culminating in arbitration or a strike. Most contain either no specific grievance procedure at all or only a very general procedure from which it may be implied that the parties did not intend it to be exclusive. *But see Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), discussed in the text, *infra*.

find that the parties intended their procedure to be exclusive and final, no such conclusion is warranted here. If anything, the parties here intended management's decision to be final unless there was mutual consent to arbitration or the Union, failing such consent, could force another result by strike. Given the express provisions of the CBA in this case, it would be illogical to conclude that the parties intended that an employee be able to seek yet another form of redress in the courts.

To the extent *Dickeson* is not distinguishable on the basis suggested here, it is submitted that the case was wrongly decided given this Court's deference to agreed upon grievance procedures. The Ninth Circuit's analysis regarding the parties' intention with respect to finality does not hold up. The resolution of a grievance by a strike is just as final as a resolution by arbitration. The fact is that the *Dickeson* court did nothing more than substitute its dispute resolution procedure for the one which was negotiated by the parties because it did not think the opportunity to strike was a *suitable* final resolution. The Sixth Circuit in *Fortune* and *Groves* declined to engage in such a radical redrafting of the contracts. It is submitted that the Sixth Circuit was right to so decline.

3. Because the vast majority of collective bargaining agreements contain mandatory arbitration procedures, petitioner does not raise an issue of sufficient general importance to warrant review.

The issue raised by petitioner is not one of general importance. A survey of CBAs conducted in 1983 found that arbitration is called for in 97 percent of the agreements surveyed. Ninety-six percent of these agreements

have provisions which specify the method by which arbitration is initiated. Ninety-one percent of these provisions provide that arbitration will be invoked at the request of either the employer or the union. In 9 percent of these agreements, arbitration automatically is the final step of the grievance procedure. Mutual agreement of the parties is required in *less than 1 percent* of the CBAs which specify the method by which arbitration is initiated. *Basic Patterns in Union Contracts* (BNA) 16 (10th ed. 1983). While this survey is somewhat out of date, it is unlikely that there has been a substantial change in the frequency of such clauses since the time of last publication.

Resolution of the issue presented here is, therefore, a matter of interest primarily to the parties involved. Few lawsuits in the lower courts will turn on resolution of this issue. Further, there is no need for a nationwide decision on the issue. Parties to CBAs can provide for mandatory arbitration in the negotiation process if the absence of such a clause is, to them, a defect. Thus, the decision of the court below does not warrant review. This case, therefore, does not present an issue of general importance.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 89-3324

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

BRUCE W. FRYE

Plaintiff-Appellant

v.

U-BRAND CORPORATION; MICHAEL MCKIBBEN

Defendants-Appellees

BEFORE: MILBURN and BOGGS, Circuit Judges, and ENGEL, Senior Circuit Judge.

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and it is therefore **ORDERED** that said judgment be and it hereby is affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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